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CONSTITUTIONAL LAW

I. SOUTH CAROLINA CONSTITUTIONAL LAW

A. *Home Rule*

1. *Special Purpose Districts*

In May, 1973, the General Assembly created the Lower Dorchester County Recreation District Commission, a "special purpose" district, to provide recreational facilities for an area outlined by Dorchester School District 5.¹ Shortly thereafter, another act of the legislature authorized this commission to issue general obligation bonds amounting to \$200,000.² Suit was brought by a taxpayer of Dorchester County attacking the two statutes as being violative of article 8, the new "home rule" provision of the South Carolina Constitution.³ The supreme court, in *Knight v. Salisbury*,⁴ ruled that the local government provisions of the constitution, as recently amended, prohibited the creation and funding of "special purpose" districts by the General Assembly.

Article 8 of the South Carolina Constitution was substantially rewritten by the Committee to Make a Study of the South Carolina Constitution of 1895.⁵ The revision was approved by the electorate and ratified by the General Assembly in March of 1973.⁶ It reflected an effort and desire on the part of the state, through its citizens and their elected representatives, to decentralize the state government. Questions of local government could be resolved on the county level without the necessity of special legislation or supervision by legislators from other counties. Before the passage of the amended version of article 8, "special purpose" districts had to be created within individual counties by the General Assembly to provide for certain governmental services.⁷ The creation of these "special purpose" districts has been sustained in the past as an exercise of the plenary powers of the

1. No. 259, [1973] S.C. Acts & Jt. Res. 302.

2. No. 644, [1973] S.C. Acts & Jt. Res. 1239.

3. *Knight v. Salisbury*, 262 S.C. 565, 206 S.E.2d 875 (1974).

4. *Id.*

5. FINAL REPORT - COMMITTEE TO MAKE A STUDY OF THE S. C. CONSTITUTION OF 1895.

6. No. 63, [1973] S.C. Acts & Jt. Res. 67.

7. Examples of such districts are those providing for drainage, hospitals, or recreation. 262 S.C. at 573, 206 S.E.2d at 878.

legislature to take any actions not specifically prohibited by the constitution.⁸ The major question arising in *Knight* was whether or not certain new sections of article 8 served to curtail the General Assembly's power to act in this area by reserving such power to the counties.⁹

The majority concluded that the language in section 7 forbidding the passage of laws for a specific county prohibited the state legislature from exercising its plenary power to create a district carrying out governmental functions solely within that county.¹⁰ The court's interpretation was drawn, to a great extent, from the premise that the provision in section 7 allowing counties to tax different areas at different rates according to municipal services received, implies a power in the county to create their own "special purpose" districts.¹¹ The basis of this premise was an assumption that the provision allowing different tax rates for certain areas of a county would be necessary only if such county had the power to create subdivisions for the delivery of municipal services similar to "special purpose" districts.¹² If the counties had such a power, they would need the taxation provision of section 7 to allow the levy of a higher tax on areas, within such a district, which are receiving more municipal services.¹³ The majority reasoned that this implication of authority to the counties to create

8. *Id.*

9. *Id.* at 572, 206 S.E.2d at 878. The relevant sections of article 8 were:

§ 1. Powers of political subdivisions continued. The powers possessed by all counties, cities, towns, and other political subdivisions at the effective date of this Constitution shall continue until changed in a manner provided by law. (1972 (57) 3184; 1973 (50) 67.)

§ 7. Organization, powers, duties, etc., of counties; special laws prohibited. *The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided.* Alternate forms of government, not to exceed five, shall be established. *No laws for a specific county shall be enacted* and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government. (1972 (57) 3184; 1973 (58) 67.) (emphasis added).

§ 17. Construction of Constitution and laws. The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

10. 262 S.C. at 574, 206 S.E.2d at 879.

11. *Id.* at 573, 206 S.E.2d at 878.

12. *Id.* at 572, 206 S.E.2d at 878.

13. *Id.*

special purpose districts obviated the need for action by the legislature and indicated an intent to extinguish the plenary powers of the legislature in this area.¹⁴

The Recreation District argued that the language in section 7 requiring the General Assembly to enact general laws providing for the structure and outlining the functions of county governments rendered the section inoperative until such general laws were passed.¹⁵ If this proposition were correct, then the practical implementation of article 8 could be postponed indefinitely by the inaction of the General Assembly. The majority of the court felt that it would be unreasonable "to assume that the framers of article VIII intended to give the General Assembly veto power over its effectiveness."¹⁶ In making this determination the court looked to section 1 of the article, which specifically provides for the continuation of the powers of counties, cities, towns and other political subdivisions in matters of local government. They inferred that the exclusion of the legislature from the list of those whose powers were to be continued indicated an intent to end the legislature's power to act on purely local issues.¹⁷

The dissent attacked the majority's position by arguing that a liberal interpretation of section 7 was prohibited by well established principles of constitutional interpretation. It was the opinion of the dissenting justices that the interpretation given section 7 by the majority would repeal, by implication, article 10, section 6, which lists the permissible purposes for which the legislature may authorize counties to levy taxes and issue bonds.¹⁸ The ma-

14. *Id.* at 574, 206 S.E.2d at 879.

15. *Id.* at 571, 206 S.E.2d at 877.

16. *Id.*

17. *Id.* at 572, 206 S.E.2d at 878.

18. *Id.* at 575, 206 S.E.2d at 880. S.C. CONST. art. 10, § 6 provides:

Credit of State; for what purposes county or township taxes levied or bonds issued.—The credit of the State shall not be pledged or loaned for the benefit of any individual, company, association or corporation; and the State shall not become a joint owner of or stockholder in any company, association or corporation. The General Assembly may, however, authorize the South Carolina Public Service Authority to become a joint owner with privately owned electric utilities, of electric generation or transmission facilities, or both, and to enter into and carry out agreements with respect to such jointly owned facilities. The General Assembly shall not have power to authorize any county or township to levy a tax or issue bonds for any purpose except for educational purposes, to build and repair public roads, buildings and bridges, to maintain and support prisoners, pay jurors, County officers, and for litigation, quarantine and court expenses and for ordinary County purposes to support paupers, and pay past indebtedness.

jority's interpretation would allow the General Assembly to create a county government with the ability to tax and issue bonds to support a "special purpose" recreational district; since recreational purposes are not enumerated as permissible in article 10, section 6, such an interpretation would place the two provisions squarely in conflict.¹⁹ When two constitutional provisions are subject to differing interpretations, some compatible and some conflicting, it is a basic principle of constitutional construction that a nonconflicting interpretation be chosen in order to give effect to both sections. The dissent felt that a perfectly reasonable alternative to the majority's interpretation of section 7, which would leave both provisions valid, would be to read it as saying, "counties shall have the power to tax different areas at different rates of taxation relative to the varying and *constitutionally permissible* governmental services provided."²⁰ This would mean that the General Assembly, through general legislation, could authorize counties to implement the taxation provisions of article 8, section 7, to tax for permissible purposes under article 10, section 6 and other specifically allowed purposes such as the public utility expenditures authorized by article 8, section 16.²¹ But funds for purposes not specifically allowed to the counties would have to be acquired through "special purpose" districts created by the General Assembly. The majority seemed to attribute any conflict between article 10, section 6 and article 8 to the fact that article 10 has yet to be amended as part of the revision process of the Constitution of 1895.²² With this in mind, they felt that any differences between the provisions must be resolved in favor of article 8 as it is the "latest expression of the electorate as to its will for constitutional provisions on this subject."²³ Although the majority's interpretation fails to harmonize section 7 com-

19. 262 S.C. at 578, 206 S.E.2d at 881.

20. *Id.* at 579, 206 S.E.2d at 881 (emphasis added).

21. S.C. CONST. art. 8, § 16 provides, in part:

Any county or consolidated political subdivision created under this Constitution may, upon a majority vote of the electors voting on the question in such county or consolidated political subdivision, acquire by initial construction or purchase and may operate water, sewer, transportation or other public utility systems and plants other than gas and electric; *provided* this provision shall not prohibit the continued operation of gas and electric, water, sewer or other such utility systems of a municipality which becomes a part of a consolidated political subdivision.

22. 262 S.C. at 574, 206 S.E.2d at 879.

23. *Id.*

pletely with article 10, section 6, it is at least in line with the spirit of decentralization behind the movement towards "home rule" and the intent of article 8 to implement this movement.

2. *Gift of Public Property to Private Persons*

Another constitutional question arose in 1974 involving the proper meaning of the term "public building" as used in article 10, section 6 of the state constitution. The relevant portion of that provision reads, "The General Assembly shall not have power to authorize any county or township to levy a tax or issue bonds for any purpose except . . . to build and repair public roads, buildings and bridges. . . ." ²⁴ In *Jacobs v. McClain*,²⁵ the plaintiffs attacked the validity of a statute²⁶ enacted by the General Assembly which allowed the Clinton Hospital District to issue bonds for the purpose of constructing an office building adjacent to the hospital which would be rented to staff physicians as private offices. The plaintiffs alleged that the proposed construction was not a public building in that the primary purpose of the building would be to provide private individuals with offices rather than to directly benefit the public.²⁷

In determining whether or not a building is "public" for purposes of inclusion in article 10, section 6, the South Carolina Supreme Court, historically, has looked to the purpose for which the building was to be used and has attempted to categorize this purpose as either private or public.²⁸ In addition, for a building to be characterized as being built for a public purpose, its purpose must not only benefit the public, but this benefit must be primary rather than incidental.²⁹ This means that benefits flowing to the public as the result of a benefit directly conferred on a private individual or group may not be considered in determining the public character of a building under article 10, section 6. In *Jacobs*,³⁰ the court reiterated the test set forth in *Feldman & Co.*

24. S.C. CONST. art. 10, § 6. The text of this provision is quoted in full in note 18 *supra*.

25. 262 S.C. 425, 205 S.E.2d 172 (1974).

26. No. 1884, [1972] S.C. Acts & Jt. Res. 3749.

27. 262 S.C. at 427, 205 S.E.2d at 173.

28. See *Battle v. Willcox*, 128 S.C. 500, 122 S.E. 516 (1924).

29. See *Feldman & Co. v. City Council of Charleston*, 23 S.C. 57 (1884). This case discussed the concept of "public purpose" generally and not in relation to a particular building.

30. See note 25 *supra*.

v. City Council of Charleston.³¹ The *Feldman* court found that "incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, [did] not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary."³²

The Clinton Hospital District, in urging that the building was primarily for a public purpose, argued that the efficiency of its medical staff would be increased by allowing them to maintain their private practices near the hospital, thus reducing travel time between their duties.³³ Further, such a convenient arrangement was said to be necessary to enable the district to attract more younger physicians into the area.³⁴ The court felt that regardless of how great the incidental advantages to the public might be, the primary benefit of this program was being extended to a private group (the staff physicians); the undertaking, therefore, must be termed private and constitutionally prohibited.³⁵

The plaintiff contended that the constitutional validity of the project should be judged according to whether it bore a "reasonable relationship" to a valid public purpose.³⁶ The court, refusing to adopt this standard, stated flatly and without comment that the project failed to pass even this less stringent constitutional standard.³⁷ In its decision, the court employed a relatively inflexible rule which seems to provide that if an indirect benefit to the public, no matter how great, results from a direct benefit to a private interest, no matter how small, then the public benefit is incidental and the purpose must be deemed private for purposes of analysis under article 10, section 6.

In *McKinney v. City of Greenville*,³⁸ the supreme court faced a situation similar to that in *Jacobs*. Article 3, section 31 of the South Carolina Constitution bars the state from donating lands it owns or controls to a private individual or group.³⁹ In 1971 both

31. See note 29 *supra*.

32. 23 S.C. at 63.

33. Record at 13, *Jacobs v. McClain*, see note 25 *supra*.

34. *Id.*

35. 262 S.C. at 428, 205 S.E.2d at 173.

36. *Id.*

37. *Id.*

38. 262 S.C. 227, 203 S.E.2d 680 (1974).

39. S.C. CONST. art. 3, § 31 (1895) provides:

Public Lands.—Lands belonging to or under the control of the State shall never be donated, directly or indirectly, to private corporations or individuals, or to

the City and County of Greenville became interested in becoming the proposed location of a new chemical plant and realized a need to engage in competition with several other possible sites.⁴⁰ In order to make the Greenville area as attractive a location as possible, the two governmental units devised a plan whereby they would lease 100 acres of jointly owned property to the industry for 99 years. The lease did not require cash rental payments or any other consideration except the payment of ad valorem taxes on improvements made to the acreage.⁴¹ The lease did, however, require that the company make substantial improvements in accordance with a regular schedule to insure a minimum return in taxes to the county.⁴² Since only the county could collect these ad valorem taxes, the city sold its interest in the property to the county in order to realize a benefit from the transaction.

The plaintiffs, taxpayers in Greenville County, brought an action to have this lease and the statute⁴³ authorizing it set aside

railroad companies. Nor shall such land be sold to corporations, or associations, for a less price than that for which it can be sold to individuals. This, however, shall not prevent the General Assembly from granting a right of way, not exceeding one hundred and fifty feet in width, as a mere easement to railroads across State land, nor to interfere with the discretion of the General Assembly in confirming the title to lands claimed to belong to the State, but used or possessed by other parties under an adverse claim.

40. This was the result of a desire by the business community to diversify local industry in order that the economy of the area would not be so greatly dependent on textiles. *See* Record at 30, *McKinney v. City of Greenville*, 262 S.C. 227, 203 S.E.2d 680 (1974). There was also testimony offered to the effect that the plant was to be both environmentally acceptable and aesthetically pleasing. Record at 56.

41. 262 S.C. at 232, 203 S.E.2d at 682.

42. The court related the required minimum schedule for improvements:

Initial term of 10 years, not less than ten million (\$10,000,000) Dollars

Second term of 15 years, fifteen million (\$15,000,000) Dollars

Third term of 25 years, twenty million (\$20,000,000) Dollars

Fourth term of 25 years, twenty-five million (\$25,000,000) Dollars

Fifth term of 24 years, twenty-five million (\$25,000,000) Dollars

Until such time as the capital improvements specified for each term are completed by Olin, the lease is not renewable for the following term, and, on the other hand, when a total capital investment of twenty-five million (\$25,000,000) Dollars has been made on this facility, Olin shall be entitled to a lease for the remainder of the 99 year period.

Id. at 232, 203 S.E.2d at 683.

43. No. 573, [1967] S.C. Acts & Jt. Res. 1084, *as amended* No. 111, [1971] S.C. Acts & Jt. Res. 89. This section provides in part:

3. To lease, sell or otherwise dispose of real and personal property in the name of the county, including all such property now owned by the county based upon a fair and reasonable value. In determining fair and reasonable value, County Council shall take into account a value to be determined by one or more

as being violative of article 3, section 31. They claimed the lease constituted a donation of state property because it failed to contain provisions requiring adequate consideration. In *McKinney v. City of Greenville*,⁴⁴ the supreme court adopted the trial court's order that both the lease and the authorizing statute were valid.

The transaction before the court was carried out pursuant to an act of the General Assembly providing, in part, that Greenville County has power "[t]o lease, sell or otherwise dispose of real and personal property in the name of the county, including all such property now owned by the county based upon a fair and reasonable value."⁴⁵ The plaintiffs contended that the language of this statute regarding the determination of value was too vague to insure that the constitutional prohibition of donations was obeyed.⁴⁶ The court accepted the trial judge's finding that the statute was patently valid under article 3, section 31, because the "fair and reasonable value" requirement precluded any "donation" of lands for private use.⁴⁷ This interpretation of the statute is strengthened by the presence of specific steps in the Act which the county council must take to determine "fair and reasonable value," such as appraisals and future income for taxation.⁴⁸

The lease arrangement itself in this case was held not to be a donation of state lands for two reasons. First, despite the fact that no rental payments were received, the court found that the increased return to the county in taxes was perfectly acceptable consideration for the lease and would serve to prevent it from being a donation under the constitution. In interpreting article 3, section 31 in the past, the court has found that the prohibition against donations of property did not bar the government from characterizing, as consideration, indirect benefits resulting from a transaction as well as direct cash contract receipts.⁴⁹ The court summarized its position in a quote from *State v. Broad River*

appraisals made by competent realtors and may take into account prospective tax revenues from improvements to be constructed on the property as well as any other considerations. Any transfer of property, upon being approved by at least six members of County Council, shall be signed by the chairman and clerk of County Council.

44. See note 40 *supra*.

45. See note 43 *supra*.

46. 262 S.C. at 241, 203 S.E.2d at 687.

47. *Id.* at 242, 203 S.E.2d at 688.

48. See note 43 *supra*.

49. See generally *Elliot v. McNair*, 250 S.C. 75, 156 S.E.2d 421 (1967); *State v. Broad River Power Co.*, 177 S.C. 240, 181 S.E. 41 (1935).

Power Co.,⁵⁰ which involved the exchange by the state of rights in the Columbia Canal for electricity: "[T]he direct benefits expected to result from the improvement of the land granted, by way of promotion of the public convenience, increase in the value of adjacent property, and taxes to be paid on the improvements themselves are sufficient to keep such a grant from amounting to a donation within the constitutional inhibition."⁵¹ The projected income to Greenville County in ad valorem taxes for the maximum lease term of 99 years was found to be over \$30 million.⁵² Since the appraised value of the property was \$350,000,⁵³ the average yearly income to the county, as a result of the transaction, equalled 85 percent of the value of the property.⁵⁴ The financial return, along with the incidental benefit to the local economy in general, was found to be sufficient consideration to negate any claim that the transaction amounted to a "donation."

Secondly, the court found that the language of article 3, section 31 prohibiting the donation of state lands was limited in its application "only to lands held by the state in its capacity as sovereign proprietor."⁵⁵ Past decisions justify the finding that this section does not apply where title to the lands in question has been validly acquired from an individual by the governing body of a political subdivision.⁵⁶ The property in this case had been acquired jointly by the City and County of Greenville from private citizens⁵⁷ and would seem to come directly under the hypothetical posed by the court in *Haelsloop v. City of Charleston*.⁵⁸ In *Haelsloop* the court observed that "[h]ad the land here involved been granted by the State to an individual, and subsequently conveyed to the city council, it would scarcely be contended that at the time of the adoption of the Constitution of 1895 it was land belonging to or under control of the state."⁵⁹

50. *Id.*

51. 177 S.C. at 264, 181 S.E. at 52.

52. 262 S.C. at 245, 203 S.E.2d at 689.

53. Record at 40, *McKinney v. City of Greenville*, 262 S.C. 227, 203 S.E.2d 680 (1974). This valuation was accepted by the trial judge as accurate. 262 S.C. at 245, 203 S.E.2d at 689.

54. 262 S.C. at 245, 203 S.E.2d at 689.

55. *Id.* S.C. at 244, 203 S.E.2d at 689.

56. The court cites *Haelsloop v. City Council of Spartanburg*, 123 S.C. 272, 115 S.E. 596 (1922) and *Bobo v. City of Spartanburg*, 230 S.C. 396, 96 S.E.2d 67 (1956). The *Haelsloop* case is particularly illustrative of this proposition.

57. 262 S.C. at 244, 203 S.E.2d at 689.

58. See note 56 *supra*.

59. 123 S.C. at 278-79, 115 S.E. at 598.

On the above stated grounds, the supreme court, adopting the order of the trial court per curiam, refused to find that the actions of the City and County of Greenville were in violation of article 3, section 31.⁶⁰

B. *Just Compensation and Impairment of Contract*

In *Trustees of Columbia Academy v. Board of Trustees of Richland County School District No. 1*,⁶¹ the supreme court rule that Act No. 585⁶² of the Acts of the General Assembly of 1971 was, in part, unconstitutional, since it served to take property without due process or compensation⁶³ and amounted to a prohibited impairment of contract.⁶⁴

60. The question of a possible violation of article 10, section 6 on grounds that the transaction required the credit of the state to be pledged or loaned for the benefit of a corporation was dismissed with little comment. 262 S.C. at 243, 203 S.E.2d at 688.

61. 262 S.C. 117, 202 S.E.2d 860 (1974).

62. No. 585, [1971] S.C. Acts & Jt. Res. 1087, in pertinent part, reads:

An Act To Amend Sections 21-3914 and 21-3916, Code Of Laws Of South Carolina, 1962, as Amended, Relating To The Board Of Trustees Of School District No. 1 In Richland County, So As To Provide For The Election Of Two Additional School Trustees And To Delete Provisions For Appointed Members On Recommendation Of The Board Of Trustees Of Columbia Academy; To Repeal Act No. 1632 Of 1795, Relating To The Board Of Trustees Of Columbia Academy, And To Transfer The Title To Property Held By The Academy To The School District.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. School commissioners to be elected.—

Section 21-3914 of the 1962 Code, as last amended by Act No. 1005 of 1966, is further amended to read as follows;

"Section 21-3914. Four school commissioners shall be elected in the general election of 1972 and each four years thereafter, and three school commissioners shall be elected in the general election of 1974 and each four years thereafter, by the legal voters of the district. The terms of office of the commissioners shall be for periods of four years and until their successors are elected and qualify."

SECTION 2. School Board—officers—employees.—

Section 21-3916 of the 1962 Code, as last amended by Act No. 1005 of 1966, is further amended to read as follows:

"Section 21-3916. The school commissioners elected as provided for in Section 21-3914, being seven in all, shall constitute a school board and they may assemble at any time and elect a chairman, a secretary, a superintendent of schools and such other school employees as they deem proper whose terms of office, duties and compensation shall be prescribed by the board."

SECTION 3. Act repealed.—Act No. 1632 of 1795 is hereby repealed. The title to all real property and to all the improvements thereon held in the name of the Board of Trustees of Columbia Academy is hereby transferred to School District No. 1 of Richland County.

63. U.S. CONST. amend. XIV; S.C. CONST. art. 1, §§ 5, 17.

64. U.S. CONST. art. I, § 10; S.C. CONST. art. 1, § 8.

The trustees of Columbia Academy were granted a charter in 1795 by the General Assembly for the purpose of establishing an educational institution in the City of Columbia and, pursuant to that charter, acquired land and capital to further this purpose.⁶⁵ In 1880 an act of the General Assembly created a school district in the City of Columbia to provide for free public education⁶⁶ and in 1883, after successfully operating two schools in Columbia for over eighty years, the Academy leased their properties to the Columbia School District. In 1883 the General Assembly amended its Act of 1880 to provide that two commissioners of the Columbia School District were to be chosen on recommendation of the trustees of the Academy.⁶⁷ In 1904, after what appears to have been a series of short term leases, the two parties executed the lease which is substantially the source of the present controversy. This lease, or "indenture," provided that the properties of the Columbia Academy were to be leased, in perpetuity, to the Columbia School District subject to five "conditions and covenants." A right of reentry was reserved to the Academy in event of a breach.⁶⁸ Covenant number four, specifically in dispute, specified "[t]hat the Board of School Commissioners for the City of Columbia shall include two members who shall have been nominated by the party of the first part [the Academy] and commissioned by the Governor of the State."⁶⁹

Act No. 585 of the Acts of the General Assembly of 1971 contained three provisions which were the source of litigation. The Act provided for the repeal of the 1795 charter of the Columbia Academy, the transfer of all property owned by the Academy to Richland School District No. 6 and the elimination of the appointment of two members of the School Board by the Academy.⁷⁰ The Academy, seeking declaratory relief, alleged that the Act was a repeal of their charter of 1795 and an elimination of their power to appoint two commissioners for the school board and thereby constituted an impairment of contract expressly prohibited in both the state and federal constitutions. It was further

65. Record at 17.

66. No. 333, [1880] S.C. Acts & Jt. Res. 404.

67. No. 269, [1883] S.C. Acts & Jt. Res. 415.

68. 262 S.C. at 123, 202 S.E.2d at 862.

69. *Id.* at 123, 202 S.E.2d at 863.

70. *Id.* at 124, 202 S.E.2d at 863. The Columbia School District had been included in Richland County School District 1 by the General Assembly in 1930. No. 1106, [1930] S.C. Acts & Jt. Res. 2015.

alleged that the attempted transfer of title to their property to the School District by statute amounted to a deprivation of property without due process or compensation.

In attacking the attempted repeal of their corporate charter, the Academy argued that the charter was a contract between them and the state which was constitutionally protected against impairment. At the issuance of the 1795 charter, charters of private entitles, as opposed to public, were protected from revocation by the impairment prohibitions of the two constitutions.⁷¹ The validity of the revocation of the Academy's charter, therefore, rested ultimately upon the question of whether the institution was public or private. The court found that although the Academy was partially endowed with public monies, the public nature of a corporation arose not from funding, but from the government's ability "to regulate, control and direct the corporation and its funds and its franchises, at its own will and pleasure."⁷² The Academy's charter granted the trustees full power to control and perpetuate its educational activities without supervision by the state. The existence of this power was found sufficient to justify a private characterization for the corporation and prohibit the repeal of the charter.⁷³

The finding that the nature of the charter was private was also determinative in deciding whether or not the portion of the statute purporting to transfer the property to Richland School District No. 1 constituted an impermissible taking of property without due process or just compensation. The court reasoned that an attempt to divest a corporation of title to property by statute would only be permissible if the corporation was a public body.⁷⁴ After characterizing the Academy as a private corporation, there could be "no doubt that this provision of the Statute is in violation of Article I, Sec. 5 and Sec. 17 of the Constitution of South Carolina and of the Fourteenth Amendment to the Con-

71. This proposition was the basis for the decision in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). A similar situation involving the Medical College of South Carolina was presented in *State v. Heyward*, 15 S.C. 148, 3 Rich. 389 (1832). The court noted that this rule is now changed by S.C. CODE ANN. § 12-401 (1962), adopted in 1841, where the General Assembly specifically reserves the power to amend, alter or repeal charters of private corporations. 262 S.C. at 126, 202 S.E.2d at 864.

72. 262 S.C. at 126, 202 S.E.2d at 864, *quoting from* *Strauss v. Marlboro County Gen. Hospital*, 185 S.C. 425, 195 S.E. 65 and *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

73. 262 S.C. at 127, 202 S.E.2d at 865.

74. *Id.*

stitution of the United States.”⁷⁵

The Academy also attacked the provisions of Act 585 which removed their power to appoint two members of Richland School District No. 1's Board on grounds that it constituted a prohibited impairment of the obligations of the lease contract.⁷⁶ As a condition for the perpetual lease granted in 1904, the Academy had required a continuing right to have two members of the Board appointed by the Governor upon recommendation by the Academy; the Board had agreed.⁷⁷ The authority of the Board to agree to such an arrangement, however, was based on two acts of the General Assembly, each providing for the establishment of the District and the composition of its Board of Trustees.⁷⁸ The court determined that the Academy's power to appoint two commissioners was based on the statute of 1883 and not on the contractual provision. The facts indicated that the Academy had not required this power as a lease condition until 1904, but had been exercising it under the statute since 1883. The District had no power, other than that granted by the legislature, to provide for the constitutency or selection of their Board membership; any attempt to grant that power to others under contract, therefore, was based upon and subject to statutory authorization. When the Board agreed to condition the 1904 lease upon the power of the Academy to appoint two of its members, its authority to do so was implicitly conditioned upon the continuing presence of enabling legislation passed by the General Assembly. If the contractual condition providing for the Academy's right to appoint was based on specific statutory authority, then an alteration of that authority did not impair the obligations required of the parties to the lease contract. Alteration merely served to remove the statutory authority under which the School District fulfilled its obligations. Noting that the question had been reserved at the trial level, the court did not rule on whether or not the District was entitled to

75. *Id.*

76. *Id.* at 124, 202 S.E.2d at 863.

77. *Id.* at 123, 202 S.E.2d at 862.

78. No. 333, [1880] S.C. Acts & Jt. Res. 404, *as amended* No. 269, [1883] S.C. Acts & Jt. Res. 415, and No. 1106, [1930] S.C. Acts & Jt. Res. 2015. The 1880 Act established a public school system for the City of Columbia and the 1883 amendment provided for the appointment of two school commissioners by the Governor on recommendation from the Board of Trustees of the Columbia Academy. The Act of 1930 consolidated the old Columbia School District with several others to form Richland School District No. 1. Section 5 of the 1930 Act specifically provided for the appointment of two commissioners on recommendation of the Academy.

remain in possession of the leasehold after failing to fulfill its obligations under the lease contract.⁷⁹

C. *Taxation*

In *Holzwasser v. Brady*,⁸⁰ the South Carolina Supreme Court upheld the constitutionality of the State Tax Commission's assessment of property owned by, or leased to, manufacturers for ad valorem tax purposes pursuant to sections 65-64(17)⁸¹ and 65-1647.1⁸² of the Code.

Holzwasser leased property to a manufacturing concern in Spartanburg County and filed the requisite tax return with the South Carolina Tax Commission.⁸³ Consequently, her property was assessed for tax purposes at a figure equal to 9.5 percent of its fair market value.⁸⁴ If the property had not been used by a manufacturer or was not otherwise subject to the provisions of section 65-64(17),⁸⁵ assessment would be made by the Spartanburg County taxing authorities and, accordingly, would receive a taxable value of 4.2 percent of market value.⁸⁶ The actual amount

79. 262 S.C. at 128, 202 S.E.2d at 865.

80. 262 S.C. 481, 205 S.E.2d 701 (1974).

81. S.C. CODE ANN. § 65-64(17) (Cum. Supp. 1974), provides that the South Carolina Tax Commission

[s]hall assess and equalize taxable values upon the property and franchises of street railway companies, electric railways, water, heat, light and power companies and private car lines, and shall assess and equalize all real and tangible personal property of manufacturers, except as to inventory, only manufactured articles which have been offered for sale at retail or which have been available for sale at retail shall be included in the inventory listed in such return. The Commission shall also assess to the owner thereof all real or personal property leased to or used by a manufacturer. All such companies shall make returns to the Commission on forms prescribed by the Commission. The owner of property leased to or used by a manufacturer shall make returns thereof to the Tax Commission on forms prescribed by the Commission.

82. S.C. CODE ANN. § 65-1647.1 (Cum. Supp. 1974), provides in part:

Notwithstanding, any other provisions of law, the assessment for property taxation of merchant's inventories, equipment, furniture and fixtures . . . which are depreciated according to a schedule satisfactory to the South Carolina Tax Commission, and manufacturers' real and tangible personal property, and the machinery, equipment, furniture and fixtures of all other taxpayers required to file returns with the South Carolina Tax Commission for purposes of assessment for property taxation, shall be determined by the Tax Commission from property tax returns submitted by the taxpayers to the Tax Commission . . .

83. *Id.*

84. The figure of 9.5 percent is in accordance with Act No. 1266, [1972] S.C. Acts & Jt. Res. 2467.

85. See note 81 *supra*.

86. See No. 1253, [1968] S.C. Acts & Jt. Res. 2837.

of tax paid is then determined by applying the millage rate of the taxing district to the resulting figure.⁸⁷ Holzwasser paid her taxes as calculated by the higher rate and, pursuant to section 65-2662,⁸⁸ brought an action in the Court of Common Pleas for Spartanburg County against the defendant, in his capacity as County Treasurer, for a refund.

The basis of her claim was that the application of sections 65-64(17) and 65-1647.1 caused two different ratios to be applied in determining the taxable value of similar property in the same county and therefore resulted in unequal and nonuniform taxation of property in violation of article 3, section 29⁸⁹ and article 10, sections 2,⁹⁰ 3A,⁹¹ and 5(1)⁹² of the South Carolina Constitution. The lower court held that the assessment ratio in excess of 4.2 percent was unconstitutional.

The majority of the supreme court found that the General Assembly had the power to classify persons and property for the purposes of taxation⁹³ and that the specific constitutional requirements of equality and uniformity⁹⁴ applied only to persons and property within a validly established taxation category.⁹⁵ The majority relied almost exclusively upon a quotation from a legal encyclopedia⁹⁶ incorporated into the previous decision of *Newberry Mills v. Dawkins*.⁹⁷ This passage reads “[g]enerally,

87. 262 S.C. at 484, 205 S.E.2d at 702.

88. S.C. CODE ANN. § 65-2662 (1962).

89. S.C. CONST. art. 3, § 29 provides: “All taxes upon property, real and personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax.”

90. S.C. CONST. art. 10, § 1 provides, in part: “The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property, real, personal and possessory”

91. S.C. CONST. art. 10, § 3A provides: “All property subject to taxation shall be taxed in proportion to its value.”

92. S.C. CONST. art. 10, § 5(1) provides, in part: “The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same.”

93. Holzwasser also alleged that the statute denied the equal protection guaranteed her by S.C. CONST. art. 1, § 5 and U.S. CONST. amend. XIV, § 1. The court held that, under existing law, a “reasonable relationship” standard for tax classifications was sufficient to satisfy the equal protection requirement. 262 S.C. at 487, 205 S.E.2d at 703.

94. See notes 89-92 *supra*.

95. 262 S.C. at 487, 205 S.E.2d at 703.

96. *Id.* at 488, 205 S.E.2d at 704.

97. 259 S.C. 7, 190 S.E.2d 503 (1972).

within constitutional limitations, the state has power to classify persons or property for purposes of taxation, and the exercise of such power is not forbidden by the constitutional requirement that the taxation be uniform and equal provided the tax is uniform on all members of the same class and provided the classification is reasonable and not arbitrary."⁹⁸

The minority in *Holzwasser* distinguished *Newberry Mills* by showing that the difference between the assessment ratios was not between real property owned by or leased to manufacturers and other real property, but rather between the real property assessment ratio and the personal property assessment ratio.⁹⁹ The system in that case involved the question of whether a 10 percent assessment ratio for personalty and a 5 percent assessment ratio for realty was violative of the constitutional requirements of uniformity when applied throughout an entire county.¹⁰⁰ The result of the taxation scheme was that all owners of both types of property paid at identical rates. The *Holzwasser* minority noted that in the litigation which ultimately led to *Newberry Mills*, the Tax Board of Review ruled in the taxpayer's favor on the exact question that was before the court in *Holzwasser*. The *Newberry Mills* court commented:

The order of the Tax Board of Review requires the commission to use the same ratios for manufactures' realty and personalty as used by the local authorities for realty and personalty of other taxpayers. There is therefore equality and uniformity in the assessment as required by the constitution and statutes.¹⁰¹

As the dissent in *Holzwasser* correctly noted, the court in *Newberry Mills*, rather than supporting a different ad valorem rate for manufacturers' property, was implying that the application of identical assessment ratios for the same type property in the same county was necessary to achieve constitutional uniformity and equality.

In *Holzwasser*, however, the court concluded that legislative tax classifications carry a strong presumption of validity and, in the absence of a showing that such classifications are arbitrary

98. 84 C.J.S. *Taxation* § 36, p. 112.

99. 259 S.C. at 13, 190 S.E.2d at 506.

100. 262 S.C. at 491, 205 S.E.2d at 706. The dissent of Justices Brailsford and Bussey quoted quite liberally from the decree of Circuit Judge Grimball.

101. 259 S.C. at 14, 190 S.E.2d at 506.

and unreasonable, should be upheld.¹⁰² The majority reasoned that if the tax classification based on *types* of property in *Newberry Mills* was reasonable, then the classification in *Holzwasser*, based on *land use* would certainly be, also.¹⁰³

The court commented that, given the validity of a taxing classification, an unequal and nonuniform rate of assessment might still occur, not between the designated class and others, but between the members of the class.¹⁰⁴ It would seem, therefore, that if the classification consisted of property used for manufacturing, and the system resulted in inequalities being imposed on manufacturers from county to county by reason of varying taxation rates, then a possible constitutional problem would arise. Millage rates applied by county taxation districts are to a great extent determined by the county's assessment ratio, *i.e.*, a certain county may determine the taxable value of land at a lower percentage of its actual value and make up for this low assessment ratio with a higher millage rate. On the other hand, the identical amount of revenue could be raised on land of similar value by lowering the millage rate and raising the assessment ratio. By requiring all property used in manufacturing to carry a rigid and identical assessment ratio from county to county, the system gives members of this tax classification no relief when they are located in a county with a low assessment ratio and high district millage rates. In such a situation, the result would be that other members of the same classification might well be receiving comparable county services and have property of comparable value but have an effective rate of taxation which is much lower, being both unequal and nonuniform.

The problem of equality of taxation came before the court in another fashion this year in *United States Fidelity and Guar. Co. v. City of Spartanburg*,¹⁰⁵ which concerned the recurring problem of the validity of the application of different rates to different businesses for the purpose of determining municipal business license taxes.¹⁰⁶ *United States Fidelity* represented itself and the

102. 262 S.C. at 488, 205 S.E.2d at 704.

103. *Id.*

104. *Id.*

105. 263 S.C. 169, 209 S.E.2d 36 (1974).

106. This method of classification has been challenged before the South Carolina Supreme Court in two recent cases, *United States Fidelity and Guar. Co. v. City of Newberry*, 257 S.C. 433, 186 S.E.2d 239 (1972) and *United States Fidelity and Guar. Co. v. City of Newberry*, 253 S.C. 197, 169 S.E.2d 599 (1969). General discussions of these opinions may be found at 22 S.C.L. Rev. 652 (1970) and 24 S.C.L. Rev. 658 (1972).

class of fire and casualty insurers in the city of Spartanburg who were attacking the city's Business License Ordinance as denying them equal protection as required by the state¹⁰⁷ and federal¹⁰⁸ constitutions by taxing their gross business receipts at a rate double that of the next highest category and greatly higher than the vast majority of businesses in the city.¹⁰⁹ The court noted that in cases such as these, there is a strong presumption of validity for upholding tax classifications but cited the recent case of *United States Fidelity and Guar. Co. v. City of Newberry*¹¹⁰ as authority for the rule that great differences in business license tax rates charged to different types of businesses will be considered constitutionally invalid unless the municipality can establish a rational basis for the increased tax.¹¹¹

Fire and casualty insurers constituted a mere 7 percent of the total business licenses in Spartanburg. The city's Business License Ordinance, however, provided rates which resulted in these businesses paying a full 20 percent of total business license revenues.¹¹² In addition, the rate of tax imposed on fire and casualty insurers, which amounted to \$20 per \$1000 of gross receipts, was twice that imposed on the next highest category.¹¹³

The court found that these figures, while not patently unreasonable, certainly created enough of a disparity in the rate of taxation between the classifications to overcome the presumption of validity and require a showing of a rational basis by the municipality.¹¹⁴

The city advanced two reasons to justify the higher tax on fire and casualty insurers. First, insurers of property, by the very nature of their business, receive much more benefit from the fire and police protection than most businesses. Secondly, fire and casualty insurers, as a class, contribute little to financing the city's operations through the ad valorem tax and should make their contribution through a higher business tax.¹¹⁵ The insurers, however, argued that the city's reasons were "irrelevant to the

107. S.C. CONST. art. 1, § 5.

108. U.S. CONST. amend. XIV, § 1.

109. 263 S.C. at 171, 209 S.E.2d at 36.

110. See note 106 *supra*.

111. 263 S.C. at 172, 209 S.E.2d at 37.

112. *Id.* at 169, 209 S.E.2d at 38.

113. *Id.*

114. 263 S.C. at 172, 209 S.E.2d at 37.

115. *Id.*

determination of a fair business license tax"¹¹⁶ and should not be considered as the basis of a valid classification which bore a rational relationship to a permissible governmental goal.

The court employed the reasoning of the United States Supreme Court in *Pacific Export Co. v. Seibert*¹¹⁷ to find that the city's justifications established a reasonable and permissible basis for increased taxation by, in fact, creating different classifications for those substantially subject to ad valorem taxes and those which are not.¹¹⁸ In *Seibert*, a state tax was levied against express companies who contracted with railroad and steamship lines but was not charged against express companies owned and operated by the carriers themselves. The state's justification for the tax was that the carriers paid taxes on their tracks, terminals, ships and rolling-stock while a direct tax was the only method of taxing the companies which only dealt by contract and had no tangible property to tax.¹¹⁹ The South Carolina Supreme Court in *United States Fidelity* made the logical conclusion that the absence of any other effective taxing mechanism was a proper criterion for establishing a tax classification with higher rates to provide for some tax contribution from a group that reaps substantial benefits from the city's public services.¹²⁰

II. FEDERAL CONSTITUTIONAL LAW

A. *Equal Protection—State Regulation of Foreign Corporations*

In *American Trust Co. v. South Carolina State Board of Bank Control*,¹²¹ a three judge federal panel ruled that parts of South Carolina's statutory effort to prevent North Carolina and Georgia banks from competing with the local banking industry in the trust business constituted a denial of equal protection. The case involved an attack on three sections of the South Carolina Code which: (1) required all banks doing trust business in this state to receive written approval by the State Board of Bank Control,¹²² (2) prohibited foreign controlled domestic corporations

116. *Id.*

117. 142 U.S. 339 (1892).

118. 263 S.C. at 174-75, 209 S.E.2d at 38.

119. 142 U.S. at 345.

120. 263 S.C. at 175, 209 S.E.2d at 38.

121. 381 F. Supp. 313 (D.S.C. 1974).

122. S.C. CODE ANN. § 8-580 (Cum. Supp. 1974) provides:

No corporation, partnership or other person shall conduct a trust business in this State without first making a written application to the State Board of Bank

from serving as executors, administrators¹²³ or testamentary trustees,¹²⁴ and (3) prohibited corporations domiciled in states adja-

Control and receiving written approval from the Board. Before any such application shall be approved, the Board shall make an investigation to determine whether or not the applicant has complied with all the provisions of law, whether in the judgment of the Board the applicant is qualified to conduct such a business and whether the conduct of such a business would serve the public interest, taking into consideration local circumstances and conditions at the place where such applicant proposes to do business; *provided, however*, that any person actively engaged in conducting a trust business in this State on January 1 1972, shall not be required to make the application and receive the approval provided for herein. *Provided, further*, that nothing contained in this section shall prevent a natural person or a national banking association having its principal place of business in this State from qualifying and acting as trustee, executor, administrator, guardian, committee or in any other fiduciary capacity.

123. S.C. CODE ANN. § 19-592 (Cum. Supp. 1972) provides:

No corporation created by another state of the United States or by any foreign state, kingdom or government, and no corporation created under the laws of the United States and not having a business in this State shall be eligible or entitled to qualify or serve in this State as executor or administrator of the estate of any person domiciled in this State at the time of his death, whether the decedent shall die testate or intestate. No officer, employee, or agent of such foreign corporation shall be eligible to serve as executor or administrator in this State, whether the officer, employee, or agent is a resident or a nonresident of this State, if such officer, employee, or agent is acting as executor or administrator on behalf of such corporation.

No corporation, partnership or organization controlled, directly or indirectly, by such a foreign corporation shall be eligible or entitled to serve as executor or administrator in this State.

124. S.C. CODE ANN. § 67-53 (Cum. Supp. 1972) provides in part:

(a) No corporation created by another state of the United States or by any foreign state, kingdom, or government, and no corporation created under the laws of the United States and not having a place of business in the State of South Carolina shall be eligible or entitled to qualify, serve, or hold title to property in this State as testamentary trustee of an estate of any person domiciled in this State at the time of his death, whether the decedent shall die testate or intestate, except, however, such foreign corporations may act as testamentary trustee in this State if:

- (1) It has a bona fide capital of at least two hundred fifty thousand dollars actually paid in;
- (2) It is authorized to act as testamentary trustee in the state in which it is incorporated or if such foreign corporation be a national banking association in the state in which it has its principal place of business; and
- (3) Any bank or other corporation organized under the laws of this State or a national banking association having its principal place of business in this State is permitted by law to act as testamentary trustee in the state in which such foreign corporation seeking to act in this State is organized or in which it has its principal place of business if it is a national banking association without further showing or qualification other than that it is authorized to act in such fiduciary capacity in this State and upon compliance with the laws of such other state, if any,

cent to South Carolina from acting as testamentary trustees.¹²⁵

American Trust Company is a South Carolina corporation wholly owned and created by National Bank of North Carolina Corporation¹²⁶ in 1970 for the purpose of transacting trust business in South Carolina in accordance with section 67-53(a)(4)¹²⁷ of the South Carolina Code.¹²⁸ This section had been amended earlier in 1970 to prevent foreign corporations domiciled in states contiguous to South Carolina from acting as trustees within the state.¹²⁹ Since NCNB had developed a substantial trust business in South Carolina, it formed American Trust to enable itself to continue providing services to its South Carolina customers. In 1972, before American Trust could effectively begin operation, the General Assembly took steps apparently designed to prevent the action taken by NCNB by amending sections 19-592¹³⁰ and 67-53.¹³¹ These amendments specifically forbade foreign corporations conducting business in South Carolina from acting as trustees, executors or administrators in South Carolina. American Trust and NCNB brought suit alleging that the statutes constituted a denial of due process and equal protection and created an impermissible burden on interstate commerce.

American Trust attacked the amendments barring foreign controlled domestic corporations from engaging in the trust busi-

concerning service of process on nonresident fiduciaries. Such foreign corporations seeking to act as testamentary trustee in this State, upon qualifying to act in such fiduciary capacity, shall not be required by law to give bond except as required of a resident corporate fiduciary in like circumstances. No officer, employee or agent of any such foreign corporation shall be eligible or entitled to serve as testamentary trustee in this State whether such officer, employee, or agent is a resident or a non-resident of this State if such officer, employee, or agent is acting as testamentary trustee on behalf of any such foreign corporation except when such foreign corporation itself shall be eligible to so serve.

No corporation, partnership or other organization controlled, directly or indirectly, by such a foreign corporation shall be eligible or entitled to serve as testamentary trustee in this State, except when such foreign corporation itself shall be eligible to so serve.

(4) Such foreign corporation is not domiciled or licensed to do business in a state contiguous to the State of South Carolina.

125. S.C. CODE ANN. § 67-53(4) (Cum. Supp. 1972).

126. Hereinafter cited as NCNB.

127. S.C. CODE ANN. § 67-53(4) (Cum. Supp. 1972).

128. 381 F. Supp. at 318.

129. See note 3 *supra*.

130. *Id.*

131. *Id.*

ness as being a denial of equal protection by discriminating against them in favor of domestically controlled corporations.¹³² The court approached the question in terms of traditional equal protection analysis.¹³³ When a statutory classification does not discriminate against a suspect class or infringe upon a fundamental right¹³⁴ the test of its validity is whether it bears a rational relationship to the furtherance of a valid state goal. A passage used by the court is instructive:

In applying [the equal protection] clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. . . . The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." . . .¹³⁵

South Carolina maintained that it had a valid interest in insuring the competence and reliability of corporate fiduciaries. To further this interest it had been necessary to pass the two amendments to "[assure] local control over fiduciaries and [to prevent] destructive competition to native controlled corporations for the ultimate benefit of the public."¹³⁶ The court found that measures calculated to insure local control of corporate fiduciaries and to prevent competition which may be detrimental to the public were certainly valid objectives for state legislation.¹³⁷ The problem, however, was that the classification system under question, foreign versus domestically controlled trust companies, had no "fair

132. 381 F. Supp. at 319.

133. *Id.*

134. An alternative analysis is required when a state, through the exercise of its police power, develops a classification system which works to the disadvantage of a "suspect" class or restricts a "fundamental" right. Under this analysis, the classification system can only be justified by a "compelling state interest" rather than the traditional test of "rational relationship" to a valid state goal. *See, e.g.,* *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974), *Shapiro v. Thompson*, 394 U.S. 618 (1969), *United States v. Guest*, 383 U.S. 745 (1966).

135. 381 F. Supp. at 320, *quoting* *Reed v. Reed*, 404 U.S. 71, 75 (1971).

136. 381 F. Supp. at 319.

137. *Id.* at 321.

and substantial relationship" to these valid state goals.¹³⁸ In reaching this decision, the court noted that a domestic trust company was subject to the same degree of state regulation and control regardless of the location of its owners.¹³⁹ The court also found that the statutory classification system, being based upon a theory which claimed that foreign control of domestic trust companies was inherently detrimental to the public interest, was totally speculative and directly in conflict with the conclusions reached by the Board of Governors of the Federal Reserve System.¹⁴⁰ As a result of their constitutional analysis, the court struck down these portions of section 67-53(a)(3) and section 19-592 as denying equal protection to foreign controlled domestic trust institutions.

NCNB also attacked section 67-53(a)(4),¹⁴¹ which forbids foreign corporations in contiguous states from acting as testamentary trustees, as being violative of due process¹⁴² and serving as an undue restriction on interstate commerce.¹⁴³ The court's treatment of the challenge to the statute as an unacceptable restraint on interstate commerce was based on their interpretation of the federal statute enabling national banks to act as fiduciaries. After finding that NCNB's operation in South Carolina constituted interstate commerce,¹⁴⁴ the court further noted that the authority of national banks to do business was based solely on that granted

138. *Id.*

139. *Id.*

140. *Id.*

141. See note 3 *supra*.

142. The court treated the due process challenge in an almost perfunctory manner. They cited *North Dakota St. Bd. of Pharm. v. Snyder's Drug Store, Inc.*, 414 U.S. 156 (1973), for the proposition that the due process clause of the fourteenth amendment will not prevent states from regulating businesses subject to state control. 318 F. Supp. at 322. *Snyder* was one of the latest in a line of cases beginning in the depression which substantially removed the due process clause as a grounds for overturning state statutes regulating business. The United States Supreme Court had originally required that a regulatory state bear "a real and substantial relation to the public health, safety, morals or some other phase of the general welfare." *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111 (1928). The Supreme Court began its retreat from this position in *Nebbia v. New York*, 291 U.S. 502 (1934), and its present view was best described in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 at 536-37 (1949):

[T]he due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a straight jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

143. 381 F. Supp. at 321-22.

144. *Id.* at 322.

them by Congress.¹⁴⁵ A state's restriction of a national bank must confine congressional authority to some extent before it can be properly considered a burden on interstate trade. The federal statute which grants national banks the authority to act as fiduciaries is 12 U.S.C. § 92a(a) and (b).¹⁴⁶ This section provides that a national bank may serve as a fiduciary whenever the state in which it is doing business allows state chartered companies to do so; so long as the national bank's action is not in contravention of state and local law.¹⁴⁷ Subsection (b), however, specifically states that a national bank's role as a fiduciary will not be considered a violation of state law under subsection (a) if state banks are allowed to act in the same capacity.¹⁴⁸ This would mean that if a state chartered bank in South Carolina were allowed to act in a particular fiduciary capacity under state law, then a national bank in South Carolina would have similar federal authority. No differentiation in state law between treatment of state and federally chartered banks could constitutionally serve to diminish the authority granted to national banks in this area by Congress. The state statutes in question here made no attempt to differentiate between state and national banks within the state but rather between all banks within the state and those in contiguous states. It was, therefore, an acceptable and effective limitation on the authority granted, subject to state statute, in subsection (a). Since NCNB's congressional authority to operate as a fiduciary in South Carolina was made subject to contrary state legislation, that legislation could not be said to burden interstate commerce.

145. *Id.*

146. 12 U.S.C. § 92 (1970) provides:

(a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

(b) Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

147. *Id.*

148. *Id.*

B. *Rules Governing Admission to the Bar*

In *Hawkins v. Moss*,¹⁴⁹ the Fourth Circuit Court of Appeals upheld the constitutionality of Rule 10 of the Rules of Examination and Admission of Persons to Practice Law in South Carolina.¹⁵⁰ Rule 10 allowed attorneys licensed to practice in other jurisdictions to be admitted to the South Carolina Bar without a bar examination if the state from which the attorney came reciprocated to admit South Carolina attorneys. The plaintiff was a resident of South Carolina and licensed to practice law in New Jersey. New Jersey did not reciprocate with South Carolina, however, and the exemption of Rule 10 was not available to him.¹⁵¹ As a result, if the plaintiff wished to be admitted to the South Carolina Bar he would be required to successfully complete the written bar examination as are all resident applicants. He contended that Rule 10 denied him equal protection of the laws by unlawfully discriminating against persons from nonreciprocating states¹⁵² and that it abridged the privileges and immunities guaranteed to him by the fourteenth amendment and article IV, section 2 by infringing on his right to interstate travel.¹⁵³

The court approached the equal protection question by agreeing with the plaintiff's contention that Rule 10 resulted in classification of attorneys seeking admission to the South Carolina Bar from other states into two groups: those from reciprocating and those from nonreciprocating states.¹⁵⁴ The treatment of

149. 503 F.2d 1171 (1974).

150. Rule 10, in pertinent part, provided:

Any attorney admitted to practice law in the highest court of the District of Columbia or in the highest court of another state in which the standard of admission is substantially equivalent to the standard of this State, who has been actively engaged for at least five (5) years next preceding filing of his application, either in the practice of law or, during said period has been a judge of a court of record or teacher of law, may be admitted to the Bar of South Carolina, without examination, upon satisfactory proof that he is a citizen of the United States and an actual resident of this State and intends to practice or teach law therein, is at least 26 years of age, and a person of good moral character.

Attorneys from states not extending reciprocity on substantially equal terms to attorneys licensed in this State shall not be admitted under this rule.

The Supreme Court of South Carolina, subsequent to the initiation of this action, repealed rule 10.

151. 503 F.2d at 1175.

152. *Id.* at 1176.

153. *Id.* at 1178-79.

154. *Id.* at 1177.

the two groups under Rule 10 was radically different in that one group was exempt from the requirement of taking a bar examination and the other was not. Under traditional equal protection analysis, however, classifications resulting in unequal treatment are unconstitutional only when the classification system used bears no rational relationship to a legitimate state goal or policy.¹⁵⁵ The court observed that reciprocity statutes were much needed, widely used tools by which a state government can undertake "to secure for its citizens an advantage by offering that advantage to citizens of any other state on condition that the other state make a similar grant."¹⁵⁶ The pursuit of reciprocal benefits for its own citizens who migrate to other states was considered a legitimate state goal which served to uphold the different treatment of applicants from reciprocating and nonreciprocating states.¹⁵⁷ The "rational relationship" of Rule 10 to such a goal developed from its denial of the provisions to citizens from nonreciprocating states. This served to encourage nonreciprocating states to take the measures necessary to begin a program of reciprocity in order that their migrant citizens could receive like benefits.

Hawkins also argued that Rule 10 denied him the privileges and immunities protected by the fourteenth amendment and article IV, section 2.¹⁵⁸ The privileges and immunities protected by the fourteenth amendment have been narrowly described by the Supreme Court of the United States as being those rights of national citizenship "which owe their existence to the Federal Government, its national character, its Constitution, or its laws."¹⁵⁹ The Court, in a later case, gave several examples of certain rights of national citizenship which were expressed or implied by the nature of the federal union:

the right to pass freely from state to state . . . , the right to petition Congress for redress of grievances . . . , the right to vote for national officers . . . , the right to enter public lands . . . and the right to inform the United States authorities of violations of its laws.¹⁶⁰

155. *Id.*, citing *McGowan v. Maryland*, 366 U.S. 420 (1961) and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

156. 503 F.2d at 1177.

157. *Id.*

158. See note 191 *supra*.

159. *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

160. *Twining v. New Jersey*, 211 U.S. 78, 97 (1908).

Although it remains unclear from plaintiff's brief on appeal, he seems to have asserted that one of the rights of national citizenship was the right of a qualified professional to move from one state to another without having to make some additional exhibition of competence in the new jurisdiction.¹⁶¹ His position was, essentially, that since he was judged qualified to practice law in New Jersey, one of the privileges and immunities of his national citizenship was to be able to travel to any state and practice his profession when he arrived. The court, however, found that the state's attempts to insure competency in the legal profession by the requirement of a written examination did not actually effect the appellant's right to interstate travel as guaranteed by the privileges and immunities clause but merely served to insure his competency to practice law within the state.¹⁶² Any incidental effect that the state's constitutionally permissible regulation of a profession might have on a migrant member of that profession would not amount to an infringement of that citizen's right to travel.¹⁶³

The privileges and immunities protected by article IV, section 2 of the Constitution have been interpreted in such a manner as to forbid states from placing disabilities on citizens of other states in favor of its own citizens. The purpose of this provision was outlined succinctly by the United States Supreme Court in *Paul v. Virginia*:

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws.¹⁶⁴

The court felt that even if discrimination did exist under Rule 10 between the treatment of attorneys from reciprocating and nonre-

161. Brief for Appellant at 21-25.

162. 503 F.2d at 1179.

163. *Id.*

164. 75 U.S. (8 Wall.) 168, 180 (1869).

ciproccating states, it was irrelevant for purposes of testing the validity of the rule under article IV, section 2. In order for the rule to be invalid under this clause of the Constitution, it would need to discriminate in favor of in-state, as opposed to out-of-state, applicants.¹⁶⁵ The court in *Hawkins* found that no such discrimination existed in that the claimant was subject to the same written examination required of all South Carolina citizens who applied for admission to the State Bar.¹⁶⁶

165. 503 F.2d at 1180.

166. *Id.*